United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL

Advice Memorandum

DATE: November 8, 2004

TO : Victoria E. Aguayo, Regional Director
Region 21

FROM : Barry J. Kearney, Associate General Counsel
Division of Advice

SUBJECT: La Opinión
Cases 21-CA-36368, 36445

530-6067-2040
530-6067-2040-8029
530-6067-6001-3700
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The Region submitted these Section 8(a)(1), (3), and (5) cases for advice primarily as to whether the Union waived its right to bargain over the Employer's decision to eliminate a bargaining unit and subcontract its work. The Region also seeks advice as to whether the Employer engaged in unlawful direct dealing with unit employees and unlawfully refused to provide the Union with requested information.

We agree with the Region that the Union, through provisions of the collective-bargaining agreement, waived its right to bargain over the Employer's subcontracting decision, and that the Employer did not engage in unlawful direct dealing with unit employees. Therefore, absent withdrawal, the Region should dismiss those allegations. However, we also agree that the Employer unlawfully refused to provide the Union with certain requested information relevant to bargaining over the effects of the Employer's subcontracting decision. Accordingly, absent settlement, complaint should issue on this allegation.[1]

FACTS

La Opinión (the Employer) is a family-run Los Angeles based Spanish language daily newspaper that employs 420 employees. Teamsters Local 986 (the Union) represents three Employer bargaining units, including one comprising its circulation department employees. The circulation

[1] [*FOIA Exemption 5*

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department consists of one rack maintenance warehouse employee, nine truck drivers, and approximately 45 sales representatives.

The Employer and Union are parties to a contract effective by its terms from March 29, 2004 through March 28, 2009. It contains a management rights clause providing, in relevant part, that

> the rights, powers and authority retained solely and exclusively by the Employer and not abridged by this Agreement include, but are not limited to [the right] to create, change, combine or abolish jobs, departments and facilities in whole or in part; to subcontract or discontinue work; to increase or decrease the work force and determine the number of employees needed; [and] to lay off employees....[2]

In early 2004, after analyzing its operation and measuring it against newspapers of comparable size and circulation, the Employer concluded that it needed to restructure to maintain growth and remain competitive. To that end, the Employer decided that converting its circulation department to an independent wholesaler operation would allow it to increase newspaper sales, meet increasing product demand, and reduce expenses.

Historically, unit truck drivers transported newspapers from the Employer's printing plant to its six distribution zone offices. From those offices, approximately 150 individuals, who were not unit employees and who the Region believes were independent contractors, delivered newspapers to newspaper retailers and coin-operated newsracks.[3] Each week, the Employer's sales representatives collected money from the retailers and coin-operated newsracks, picked up unsold newspapers, and addressed customer complaints. Sales representatives were also responsible for targeting new accounts within their sales territories, and they made deliveries when unit truck drivers were unable to do so. The rack maintenance employee repaired damaged coin-operated newsracks.

Under the Employer's restructuring plan, all circulation department unit employees except for the rack maintenance employee would be terminated, as would the non-

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[2] This management rights clause is identical to the one contained in the parties' previous contract.

[3] The Employer ceased making home newspaper deliveries in April.

unit delivery contractors. The Employer also would eliminate its six distribution zone offices and, instead, would hire a trucking firm to transport newspapers from the printing plant to 17 "independent wholesalers" (wholesalers), each of whom would be assigned a territory. Each wholesaler would be responsible for taking delivery of the newspapers from the trucking firm, delivering newspapers to retailers and coin-operated newsracks, billing customers, picking up unsold newspapers, maintaining wire newsracks, addressing customer complaints, and increasing the number of retail accounts in his or her territory.

The Employer laid off approximately 45 unrepresented employees in April as part of this restructuring plan. On June 3, Employer Chief Operating Officer Bob Karcher and Human Resources Representative Bill Graham informed Union Business Agent Dan Cortez of the restructuring decision, that it would result in the circulation department's elimination, and that the Employer intended to announce the decision to employees the following day. Graham also told Cortez that the Employer intended to offer affected employees a severance benefit of one week's pay for each year of employment. This marked the first time that any Union official had heard about the Employer's decision, as the subject of restructuring never arose during the parties' recently concluded contract negotiations. The parties have not met about this matter since June 3.

On June 4, Monica Lozano, the Employer's publisher and chief executive officer, held a mandatory meeting and informed employees that the Employer was implementing the restructuring plan in order to increase growth and remain competitive. She explained that the circulation department would be eliminated, that all circulation department employees would be terminated, and that wholesalers would assume their responsibilities. Lozano told employees they were welcome to apply for one of the 17 wholesaler positions, but that outside applicants would also be considered.[4] She mentioned the severance benefit the Employer intended to offer, and stated that upcoming workshops would provide more information on applying to become a wholesaler, preparing unemployment papers,

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[4] Applications were due by July 14. Several Union members applied for wholesaler positions, but the Employer selected only one of them. The Union filed a charge on August 4, 2004 (Case 21-CA-36459) alleging that the Employer unlawfully discriminated against Union members in selecting wholesalers. [*FOIA Exemption 5*

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formulating job search strategies, and coping with the stress of a layoff. During a question-and-answer period that followed, Lozano reiterated that the Employer made its decision to become financially stronger. Graham distributed handouts with answers to frequently asked questions, workshop descriptions and dates, information about the Employer's employee assistance program, and a tentative transition timeline.[5]

The Employer held an optional employee meeting during the third week of June to discuss the wholesaler system. Circulation manager Jim Pellegrino distributed a binder detailing the wholesaler positions and the application procedure. He estimated that start-up costs -- which included a $7,000 deposit with the Employer; $3,000 for computer hardware and software; and proof of a two-week reserve of roughly $4,000 to $5,000 to pay employees -- would run between $16,800 and $17,680. In addition, he stated that wholesalers might need as many as three licenses (e.g., a business license) and other documentation in order to operate as independent contractors. The Employer also held a workshop on June 18 covering job search strategies and ways to overcome a job loss.

On July 16, the Union requested copies of internal studies or reports the Employer relied on in making the decision to restructure, as well as information concerning the Employer's plans for its existing equipment and the equipment wholesalers would need; the manner in which wholesalers would be selected, compensated, and assigned territories; wholesalers' job functions and duties; the basis of their estimated start-up costs; copies of wholesalers' customer lists; and severance, relocation, and retirement benefits to be offered to non-unit employees affected by the Employer's restructuring decision. By letter dated July 23, the Employer refused to provide any of the requested information, asserting that it related to a decision over which the Employer had no obligation to bargain, was irrelevant, and constituted an improper attempt to bolster the Union's unfair labor practice charge.

ACTION

We agree with the Region that the Union waived its right to bargain over the Employer's subcontracting decision

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[5] The Employer's timeline contemplated gradually restructuring its six zones to wholesaler operations between July 26 and September 20, with the wholesaler system fully in place by September 27.

in the parties' contract, and that the Employer did not engage in unlawful direct dealing with unit employees. However, we also conclude that the Employer unlawfully refused to provide the Union with certain information relevant to bargaining over the effects of the Employer's subcontracting decision.

A. The Union waived its right to bargain over the Employer's subcontracting decision.[6]

Waiver of a statutory right is not lightly inferred and can be established only if it is clear and unequivocal.[7] To satisfy this standard, contract language must be specific or it must be shown that the parties fully discussed the matter at issue and that the waiving party consciously yielded its interest in the matter.[8] In Allison Corp., the Board found that the union had clearly and unmistakably waived its statutory right to bargain over the employer's decision to subcontract where the parties' contract contained a management rights clause that "specifically, precisely, and plainly" granted the employer the exclusive right to subcontract without restriction.[9] Accordingly, the Board held that the employer did not violate Section 8(a)(5) by unilaterally subcontracting unit work.[10]

We conclude that, as in Allison Corp., the Union here clearly and unmistakably waived its right to bargain over the Employer's decision to eliminate the circulation department and subcontract that work to wholesalers. Thus, the management rights clause in the parties' current contract -- identical to the one contained in their previous contract -- vests the Employer with the exclusive and unrestricted right "to create, change, combine *or abolish jobs*, departments and facilities in whole or in part; to *subcontract* or discontinue *work*; to increase or decrease the

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[6] Another aspect of Case 21-CA-36455 alleged that the Employer's announced severance benefit constituted direct dealing and a refusal to engage in effects bargaining, both in violation of Section 8(a)(5). However, the Union withdrew these allegations on August 4 because the parties commenced effects bargaining on August 2.

[7] Metropolitan Edison v. NLRB, 460 U.S. 693, 708 (1983).

[8] Allison Corp., 330 NLRB 1363, 1365 (2001), citing Trojan Yacht, 319 NLRB 741, 742 (1995).

[9] 330 NLRB at 1365.

[10] Ibid.

work force and determine the number of employees needed; [and] to *lay off employees*...." (Emphasis supplied.) In our view, the management rights clause "specifically, precisely, and plainly" grants the Employer the right to unilaterally abolish the unit jobs at issue, eliminate the circulation department, and to subcontract their work to wholesalers.[11]

B. The Employer did not engage in unlawful direct dealing.

It is well settled that the Act requires an employer to meet and bargain exclusively with its employees' representative, and an employer that deals directly with its unionized employees or with a representative other than their designated bargaining agent regarding terms and conditions of employment violates Section 8(a)(1) and (5).[12] However, the Board has also held that an employer's announcement of a clearly predetermined course of action does not constitute direct dealing.[13]

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[11] We agree with the Region that the wholesalers are independent contractors, and not statutory employees covered by the Act. However, without deciding the issue, we note that the wholesaler's independent contractor status may not preclude a finding that the Employer discriminated against Union members in selecting wholesalers (with whom it will do business), as the Union alleges in Case 21-CA-36459. Thus, in Pacific American Shipowners Assn., 98 NLRB 582, 598 (1952), enfd. 218 F.2d 913 (9th Cir. 1955), cert. denied 349 U.S. 930 (1955), the Board dismissed a Section 8(a)(3) complaint as to eight alleged discriminatees, who were former supervisors applying for supervisory positions with a different employer, because they were not statutory employees entitled to the Act's protections. The Board held that Section 8(a)(3) gives no protection "to those seeking and to those holding supervisory jobs." Id. at 596. In contrast, the Act does protect rank and file employees when they apply for supervisory positions with their current employer. Id. at 597. In the instant cases, those Union members who applied for wholesaler positions were statutory employees of the Employer at the time they submitted their wholesaler applications and thus, by analogy to the Board's reasoning in Pacific American, may be entitled to the Act's protections. [*FOIA Exemption 5*
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[12] Allied Signal, Inc., 307 NLRB 752, 753 (1992); Medo Photo Supply Corp. v. NLRB, 321 U.S. 678, 684 (1944).

[13] Johnson's Industrial Caterers, Inc., 197 NLRB 352, 356 (1972), enfd. 478 F.2d 1208 (6th Cir. 1973) (employer's announcement to employees of unilateral changes, though

We conclude that, as in Johnson's Industrial Caterers, neither the Employer's June 4 announcement regarding elimination of the circulation department and subcontracting that unit work to wholesalers, nor its subsequent statements at the optional employee meeting, constituted unlawful direct dealing. The Employer did not solicit employee sentiment or attempt to induce employees to repudiate the Union. Rather, the Employer announced and explained a predetermined course of action which it was privileged to take unilaterally under the parties' contract.

C. The Employer unlawfully refused to provide the Union with certain information relevant to effects bargaining.

Under Section 8(a)(5), bargaining over the effects of a decision must be conducted in a meaningful manner and at a meaningful time.[14] Bargaining in a meaningful manner concerning the effects of a decision encompasses the obligation to timely provide a union, on request, with information relevant and necessary to the proper performance of its duties as bargaining representative.[15] Further, an employer must provide a union with requested information if there is a probability that such data is relevant and will be of use to the union in fulfilling its statutory duties and responsibilities as exclusive bargaining representative.[16] The Board uses a liberal, discovery-type

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unlawful because instituted without notice to or consultation with union, did not independently constitute unlawful direct dealing, where employer neither made offers to employees seeking acceptances nor sought to induce employees to repudiate union). Cf. Harris Teeter Supermarkets, 310 NLRB 216, 217 n.6 (1993) (unlawful direct dealing where employer solicited employee sentiment with regard to changing the workweek, a subject it planned to raise with the union at upcoming negotiations; employer asked employees if they "liked" or "were for" the change, thus plainly seeking employees' views at a time when the employer had not yet committed itself to them).

[14] First National Maintenance Corp. v. NLRB, 452 U.S. 666, 681-682 (1981).

[15] See, e.g., Sea Jet Trucking Corp., 327 NLRB 540, 546 (1997), enfd. 221 F.3d 196 (D.C. Cir. 2000) (Table) (internal citations omitted) (effects of a plant relocation decision).

standard to determine whether information is relevant, or potentially relevant, so as to require its production.[17] Information concerning unit employees is presumptively relevant and necessary, and must be produced.[18] Information concerning non-unit employees is not presumptively relevant and a union must establish its relevance.[19] This burden, however, is not exceptionally heavy.[20]

Applying these principles here, we conclude that the Employer unlawfully refused to provide the Union with the information it requested concerning severance, relocation, and retirement benefits the Employer offered non-unit employees laid off in connection with the Employer's restructuring. Thus, although this information is not presumptively relevant because it concerns non-unit employees, we conclude that it is demonstrably relevant to the Union's formulation of severance proposals in connection with the parties' ongoing effects bargaining. The fact that the Employer effectively made the initial severance proposal (although not framed as such) when it unilaterally announced that it intended to offer unit employees one week's pay for each year of employment, and thereby raised the topic of severance benefits, underscores the probable relevance of this information.

However, we conclude that the Employer was not obligated to provide the Union with the balance of the information it requested. Thus, the Union cannot establish the relevance of the information it sought to the extent it concerns the restructuring decision itself (e.g., copies of internal studies or reports the Employer relied on in deciding to eliminate the circulation department unit) because, as set forth above in Section A, the Union had waived its right to bargain over this decision.[21] Further,

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[16] Duquesne Light Co., 306 NLRB 1042, 1043 (1992), quoting Bohemia, Inc., 272 NLRB 1128, 1129 (1984) (internal citations omitted).

[17] Ibid.

[18] Ibid.

[19] Ibid.

[20] Id. at 1044, quoting Leland Stanford Junior University, 262 NLRB 136, 139 (1982), enfd. 715 F.2d 473 (9th Cir. 1983).

[21] See, e.g., Ingham Regional Medical Center, 342 NLRB No. 129, slip op. at 5 (2004) (where employer not obligated to bargain over subcontracting decision, union could not

we conclude that the Union cannot demonstrate the relevance of the requested information to the extent it concerns the wholesalers (e.g., their working conditions and estimated start-up costs). Thus, the Employer's restructuring plan will obviate the Union's future representative status because the wholesalers are independent contractors who are not covered by the Act.[22]

Consistent with the foregoing, the Region should dismiss, absent withdrawal, the refusal to bargain and direct dealing allegations, but issue complaint, absent settlement, alleging that the Employer violated Section 8(a)(5) by refusing to provide the Union with certain information relevant to the parties' effects bargaining.

B.J.K.

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demonstrate the relevance of information concerning subcontracting).

[22] Cf. Gitano Distribution Center, 308 NLRB 1172, 1183-1184 (1992) (union entitled to information relevant to its efforts to bargain about transferring laid off unit employees); and Comar, Inc., 339 NLRB No. 110, slip op. at 10-11 (2003), enfd. 2004 WL 1146958 (D.C. Cir. 2004) (not selected for publication) (union entitled to information concerning location of unit employees and their equipment employer had moved to different facility, names of supervisors overseeing unit employees work at that facility, and a description of their terms and conditions of employment there). Unlike here, where the Union's representative function will cease once the circulation department unit is eliminated, the unions in Gitano and Comar maintained a representative role vis-à-vis the unit employees at issue even after the employers' relocation decisions.